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In the
Supreme Court of the United States

October Term, 1963
No. 238

IN THE MATTER OF CONTEMPT PROCEEDINGS
IN RE MRS. OWEN JENISON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

JOHN S. CONNOLLY
303 Degree of Honor Bldg.
St. Paul, Minnesota

LOUIS W. CLAESON, JR.
2512 W. Franklin Ave.
Minneapolis, Minnesota
Counsel for Petitioner

Of Counsel.

TERRANCE SANDALOW
American Civil Liberties
Union—Minnesota Branch

OTIS H. GODFREY, SR.
416 Minnesota Bldg.
St. Paul, Minnesota

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Laverna H. Jenison prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in this case on March 8, 1963.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota (App. *infra;* pp. 17-26) is reported at 120 N. W. 2d 515.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on March 8, 1963. Rehearing was denied on March 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

A. Whether petitioner's conviction for contempt for refusing to serve on a jury because of her religious beliefs, which include a literal version of Matthew, Chapter 7, verse 1—"Judge not, that you be not judged"—violated her rights under the free exercise clause of the first amendment, made applicable to the states by the fourteenth amendment.

B. Whether petitioner's summary conviction for contempt without advising her of her right to counsel and without affording her adequate time to prepare a defense, violated her rights under the fourteenth amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The United States Constitution provides in relevant part as follows:

First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *

Fifth Amendment:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation; * * * and to have the Assistance of Counsel for his defence.

Fourteenth Amendment:

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *

B. The Minnesota Statutes Annotated provide in relevant part as follows:

593.04 Qualifications, disabilities, and exemptions

* * * The qualifications, disabilities, and exemptions of petit jurors shall be the same as those prescribed by law in the case of grand jurors * * *

628.43 Exemption from service

* * * In addition to the persons otherwise exempted therefrom by law, the following persons shall be exempt from service as grand jurors: United States officers, judges of courts of record, commissioners of public buildings, the state auditor, treasurer, and librarian, all county and city officers, including members of school boards in cities of the first class, constables, attorneys at law, ministers of the gospel, preceptors, and teachers of high and graded schools and academies, one teacher in each common school, practicing physicians and surgeons, duly licensed embalmers, one miller to each grist mill, one ferryman to each licensed ferry, all acting telegraph operators, all members of fire companies organized according to law, all engineers actively engaged as locomotive or stationary engineers, all persons more than 60 years of age, all persons not of sound mind or discretion, and all persons subject to any bodily infirmity

amounting to disability. All persons unable to speak and understand the English language, all persons whose names have been placed on any jury list at the request or suggestion, direct or indirect, of any person other than the officer charged with preparing such list, and all persons who shall have been convicted of any infamous crime, shall be disqualified from serving as grand jurors.
* * *

628.49 Grounds of excuse; record

* * * Any woman drawn upon either a grand or a petit jury may, in the discretion of the court, be excused from such jury service upon request.

STATEMENT

Petitioner was called for jury duty at the general term of The Renville County, Minnesota, District Court on November 13, 1962. In an orientation talk, the judge "invited anyone who felt they had just ground for excuse to confer with the Court at recess in Chambers." (Return to Writ, p. 1).

At such recess, petitioner "came into Chambers and asked to be excused on the ground of her religious belief." (*Ibid.*) Petitioner is a member of the Church of God. She is a believer of the Bible and takes literally the words in Matthew, Chapter 7, verse 1: "Judge not, that you be not judged." The judge "advised her that she could not be excused" (*Ibid.*) and told her that, if she refused to serve, "she would be held in contempt of Court and punished." (*Ibid.*).

Petitioner was then selected to sit on a civil case. Before the clerk administered the oath, at 9:45 a.m., petitioner restated her objection. The judge held petitioner guilty of contempt and ordered her to remain in the courtroom, to be dealt with "summarily during recess time." (Tr. p. 2).

Petitioner had acted as a juror in 1948 but had experienced a change in her religious beliefs since that time.

At 11:45 a.m., petitioner again stated that she could not serve. She was then sentenced to the county jail for thirty days. Petitioner was not advised of her right to counsel nor did the judge inquire whether she wished time to obtain counsel or prepare a defense. The judge ordered that petitioner could purge herself "at any time during said period if you will indicate to the Sheriff that you * * * are willing to do your civic duty." (*Id.* at p. 4).

Petitioner remained in custody for seven days. On November 20, 1962, petitioner was released pending hearing by the Supreme Court of Minnesota. On that date, a writ of certiorari was filed in the Supreme Court of Minnesota urging, inter alia, that petitioner's conviction for criminal contempt violated her rights "under the first Amendment of the United States Constitution for Freedom of Religion; the Fifth Amendment which provides for Due Process of Law and the Sixth Amendment, which provides for The Right to Counsel; and the Fourteenth Amendment of the Constitution of the United States which makes applicable to the State of Minnesota, the First, Fifth and Sixth Amendments of the United States Constitution." (Petition for Writ, p. 2).

No question has been raised in this case concerning the sincerity of petitioner's religious beliefs in adhering to this tenet of her faith based upon an interpretation of the Holy Bible.

On March 8, 1963, the Supreme Court of Minnesota affirmed. Rehearing was denied on March 29, 1963.

REASONS FOR GRANTING THE WRIT

A. PETITIONER'S CONVICTION FOR CONTEMPT VIOLATED HER RIGHTS UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

The decision below makes petitioner's religious beliefs illegal, as such. She must either foresake them or go to prison. Minnesota's interest in forcing petitioner to make this choice is minimal, as evidenced by the myriad of exemptions from jury service already provided under Minnesota law.

1. The free exercise clause is applicable to the states through the fourteenth amendment. In *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940), the Court stated:

> "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."

2. This case involves a *direct* conflict between petitioner's religious principles and state authority. Petitioner's religious principles forbid her from serving on a jury since those principles include a literal version of Matthew, Chapter 7, verse 1, which says: "Judge not, that you be not judged." The conflict between petitioner's religious tenets and the exercise of state authority is to be characterized as *direct* because the judgment below makes petitioner's religious practice itself unlawful. That is, the option afforded petitioner is either to abandon her religious principles or to face imprisonment. *Cf. Braunfeld v. Brown*, 366 U. S. 599, 605-06 (1961). "In such cases," this Court has stated, "to

make accommodation between the religious action and an exercise of state authority is a particularly delicate task." *Id.* at 605.

3. This case is to be distinguished from those instances in which state regulation "imposes only an *indirect* burden on the exercise of religion, *i.e.*, [a regulation] which does not make unlawful the religious practice itself." *Id.* at 606. (Emphasis added).

In *Braunfeld v. Brown*, 366 U. S. 599 (1961), the Court upheld the application of a Sunday Closing Law to members of the Orthodox Jewish faith because the Sunday Law did not face these persons "with as serious a choice as foresaking their religious practices or subjecting themselves to criminal prosecution." *Id.* at 605. This is precisely the serious choice which faces petitioner in the instant case. Rather, the Sunday Closing Laws, as applied to members of the Orthodox Jewish faith, permitted them to adhere to their religious practices at the cost only of "mak[ing] the practice of their religious beliefs more expensive." *Ibid.*

Even in instances in which state regulation has merely imposed an economic burden, *i.e.*, an *indirect* burden, on the observance of religious practices, the Court has found the state regulation in violation of the free exercise clause. On June 17, 1963, the Court, in *Sherbert v. Verner* (No. 526, 1963 Term), reversed the decision of the Supreme Court of South Carolina that a Seventh Day Adventist was ineligible for unemployment compensation benefits because she refused to accept employment requiring her to work on Saturdays. The choice facing petitioner in the instant case—abandon her religious convictions or be sentenced to jail—is obviously more serious than the choice facing appellant in *Sherbert v. Verner*—abandon her religious convictions or forego unemployment compensation benefits. See

also *Murdock v. Pennsylvania*, 319 U. S. 105 (1943) and *Follett v. McCormick*, 321 U. S. 573 (1944).

4. In only three instances has the Court upheld the power of government to make a religious practice itself unlawful. And, in those cases, "the conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 31 U. S. L. Week 4719, 4720. The first involved the illegality of polygamy. *Reynolds v. United States*, 98 U. S. 145 (1879). The Court there said:

> "Polygamy has always been odious among the northern and western nations of Europe * * * At common law, the second marriage was always void * * * and from the earliest history of England polygamy has been treated as an offense against society." *Id.* at 164.

And, subsequently, the Court stated in *Mormon Church v. United States*, 136 U. S. 1, 49 (1890):

> "The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism."

See also *Cleveland v. United States*, 329 U. S. 14, 18-19 (1946). Surely, petitioner's religious principles may not be so characterized.

The Court has said that the free exercise clause "was never intended * * * as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society." *Davis v. Beason*, 133 U. S. 333, 342 (1890). But content to this language must be afforded by the context in which it appeared—the context of polygamy. In *United States v. Hillyard*, 52 F. Supp. 612 (E. D. Wash. 1943), the only other reported case presenting the

question involved in the instant case,[1] Judge Lewis B. Schwellenbach, in upholding the free exercise claim, stated:

> "While I cannot understand defendant's reasoning and cannot accept his conclusion, I must admit that his refusal to serve does not amount to a breaking out 'into overt acts against peace and good order.' I have no fear that the prestige of this Court will be diminished by this result. Fortunately, in this country the dignity of a court does not depend on its use of its power."

Another instance of the Court's sustaining the illegality of a religious practice is *Prince v. Massachusetts*, 321 U. S. 158 (1944). That case upheld a statute making it criminal for a child under twelve to sell anything on a street or in any public place. The statute was applied to the parent of a child who believed it to be her religious duty to sell religious literature. But that decision was narrowly restricted to the state's general interest in youth's well being as *parens patriae*.[2] *Id.* at 166. The Court said:

> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. Among evils most

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[1] The paucity of litigation involving the instant issue would seem to be explained on the ground that most trial judges simply excuse those who cannot serve on juries because of religious scruples. *Cf. Cashaw v. Great Lakes Greyhound Lines*, 331 Mich. 291, 295, 49 N. W. 2d 183, 185 (1951). This is probably so because of the likelihood that a juror who is forced to serve under these circumstances will not serve very well.

[2] This rationale also explains the result in *Craig v. State*, 220 Md 590, 155 A.2d 684 (1959), relied on by the court below. That case involved the prosecution of parents who, because of religious beliefs, refused to provide their child with necessary medical attention.

> appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power * * *"

The State of Minnesota has no such compelling interest here. The fact is that Minnesota law exempts many classes of persons from jury service. Among these are: ministers; school teachers; practicing doctors; embalmers; all persons over 60 years of age; commissioners of public buildings; the state auditor, treasurer, and librarian; all county and city officers; certain school board members; constables; attorneys at law. *M. S. A.* §§ 593.04, 628.43. Furthermore, any woman may be excused within the discretion of the court. *M. S. A.* § 628.49. Surely, the state cannot be heard to say that its interest in having this petitioner serve, at pain of criminal conviction, is so great as to overcome her conscientious duty to adhere to her religious principles. *Cf. Torcaso v. Watkins*, 367 U. S. 488, "in which an undoubted state interest in insuring the veracity and trustworthiness of Notaries Public was held insufficient to justify the substantial infringement upon the religious freedom of applicants for that position which resulted from a required oath of belief in God." *Sherbert v. Verner*, n. 9.

The final instance of the Court's upholding the power of a state to make a religious practice itself illegal was *Minersville School District v. Gobitis*, 310 U. S. 586 (1940). However, this case was overruled in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943). In these cases, Jehovah's Witnesses refused to salute the flag as part of a daily school exercise.

The flag salute problem is, in many ways, similar to the instant one. In *Barnette*, appellees took literally certain Biblical statements. *Id.* at 629. In *Barnette*, the Court stated:

> "The freedom asserted by these appelles does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual." *Id.* at 630.

Clearly, the same may be said of the freedom asserted in the instant case. In *Barnette*, the interest of the state in compelling the flag salute was found to be minimal indeed. *id.* at 636-37. So, too, as has been shown above, is Minnesota's interest here. In *Barnette*, the Court stated:

> "But freedoms of speech and of press, of assembly, and of worship * * * are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *Id.* at 639.

Certainly, it may not be reasonably argued that excusing the few people like petitioner from jury service presents a "grave and immediate danger" to the jury system. This is particularly true in reference to Minnesota because of the host of exemptions it already permits.

5. The court below felt that the burden which petitioner's conscience would suffer by having to serve on the jury

would be "slight compared with the sense of guilt which might well afflict a conscientious objector who may be required to kill another human being in time of war without any constitutional right of exemption." 120 N. W. 2d at 519.

But this case may not reasonably be likened to any authority which Congress may have under the War Powers. See *United States v. Macintosh*, 283 U. S. 605, 622 (1931). Nor is it within the province of the courts to assess the individual's burden of conscience. As stated by the Court in *United States v. Ballard*, 322 U. S. 78, 87 (1944):

> "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted * * *"

B. THE SUMMARY PROCEDURE UNDER WHICH PETITIONER WAS CONVICTED OF CONTEMPT VIOLATED HER RIGHTS UNDER THE FOURTEENTH AMENDMENT.

Upon refusal of the petitioner to serve as a juror she was forthwith held in contempt and ordered to remain in the courtroom until sentencing two hours later. Petitioner was thus afforded no opportunity to prepare a defense or to obtain the assistance of counsel. Yet, adequate opportunity to prepare a defense and assistance of counsel to aid in such preparation are among the most fundamental of the protections which the fourteenth amendment secures to defendants in criminal cases.

In a line of decisions commencing with *Powell v. Alabama*, 287 U. S. 45, this Court has given frequent application to the fourteenth amendment's guarantee of "the fundamental right of the accused to the aid of counsel in a

criminal proceeding." *Grosjean v. American Press Co.*, 297 U. S. 233, 244. Only last term, the Court concluded that the assistance of counsel is so much "a fundamental right, essential to a fair trial" that due process requires the appointment of counsel for an indigent defendant in a state criminal proceeding. *Gideon v. Wainwright*, 372 U. S. 335, 340.

While it is only within the past year that the Court has established the right of an indigent defendant to the *appointment* of counsel, it had established long before that the right of a defendant in a state criminal proceeding "to be heard through his own counsel [is] unqualified." *Chandler v. Fretag*, 348 U. S. 3, 9. See also *Powell v. Alabama*, *supra* at 69. Yet the record is clear that in the present case the petitioner was neither advised of her right to obtain counsel nor afforded the opportunity to obtain one.

Reason and authority combine to make clear that petitioner, summarily held in criminal contempt, has thus been deprived of the safeguards guaranteed by the fourteenth amendment. The guilt or innocence of an individual cited for contempt, no less than one charged with any other offense against the state, must be determined in accordance with the essentials of fair procedure—including reasonable notice of the charge against him and representation by counsel. That was the clear holding of *In re Oliver*, 333 U. S. 257, in which the Court reversed a summary contempt conviction by a state judge who, pursuant to established state procedures, was sitting as a "one-man grand jury." The validity of the procedure employed, the Court said, must be measured "by the constitutional standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both." *Id.* at 265.

Measured by these standards, the summary procedure,

identical with that employed in the present case, was held violative of due process.

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony and to be represented by counsel. Michigan, not denying the existence of these rights in criminal cases generally, apparently concedes that the summary conviction here would have been a denial of due process but for the nature of the charge, namely a contempt of court, committed, the State urges, in the court's actual presence."
>
> * * * * *
>
> "*Except for a narrowly limited category of contempts, due process of law * * * requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation,* [and] *have the right to be represented by counsel.* * * * The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the jury, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, and where immediate punishment is essential *to prevent 'demoralization of the court's authority' before the public.*" *Id.* at 273-75. (Emphasis supplied.)

There is, of course, no suggestion that in the present case petitioner was guilty of such misconduct as to "disturb the court's business" or require "immediate punishment * * * to prevent 'demoralization of the court's authority' before the public." This case does not, therefore, fall within that "narrowly limited category of contempts" in which the use

of a summary procedure—with the consequent denial of fundamental procedural safeguards—is constitutionally permissible.

Analysis of the issues relevant to a determination of whether the petitioner was guilty of contempt indicates that she may have been seriously prejudiced by denial of any opportunity to prepare a defense with the assistance of counsel. Petitioner's statement of her refusal to serve as a juror, devoid of any suggestion of a legal right, must have appeared to the trial judge a wholly unjustifiable defiance of his judicial authority. With the assistance of counsel, petitioner would, as we have attempted to demonstrate in the first part of her petition, have been able to argue persuasively that because of her religious scruples she was constitutionally entitled to be excused from jury service. That is the thrust of the relevant decisions of this Court and the holding of the only reported decision squarely on point.

The substantiality of petitioner's claim for exemption might also have been deemed relevant to a determination of whether the trial judge, under discretion vested in him by state law, should have excused petitioner from jury service. *M. S. A.* Sec. 628.49 provides in part:

> "Any woman drawn upon either a grand or petit jury may upon the discretion of the Court be excused from such jury upon request."

Experienced counsel might have urged, as a layman could not, that in view of the substantiality of petitioner's constitutional claim and this nation's tradional respect for religious beliefs conscientiously held, an exercise of the judge's discretion in petitioner's behalf would have been the wisest course. It would also have been relevant for counsel to inform the judge of how other judges in the state had

disposed of such claims by others whose religious beliefs prohibit service on juries.

Petitioner's plight was, thus, precisely as stated by this Court in *Powell v. Alabama, supra:*

> "Even the intelligent laymen has small and sometimes no skill in the science of law. * * * He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guilding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

JOHN S. CONNOLLY
303 Degree of Honor Bldg.
St. Paul, Minnesota

LOUIS W. CLAESON, JR.
2512 W. Franklin Ave.
Minneapolis, Minnesota
Counsel for Petitioner

Of Counsel.

TERRANCE SANDALOW
American Civil Liberties
Union—Minnesota Branch

OTIS H. GODFREY, SR.
416 Minnesota Bldg.
St. Paul, Minnesota

June 1963

APPENDIX

Opinion of the Supreme Court of Minnesota

OTIS, Justice.

This matter is before the court on a writ of certiorari to review a conviction for contempt arising out of the refusal of relator, Laverna H. Jenison, to act as a petit juror for the assigned reason that such service is in conflict with her religious principles.

It appears that Mrs. Jenison was called for jury duty at the general term of the Renville County District Court on November 13, 1962, and was selected to sit on a civil case. When the clerk was about to administer the oath, the following colloquy occurred:

> "Mrs. Jenison: (Standing) Sir, I cannot serve on this jury. I cannot judge.
>
> "The Court: The Court has told you that you must serve, and you will remain where you are and serve as a juror in this case.
>
> "Mrs. Jenison: Well, I'll pronounce no judgment. I can't. It's against my Bible teaching. My Bible tells me 'Judge not, so you will not be judged.'
>
> "The Court: In view of your statements the Court holds you in contempt of Court. You will stay in the courtroom and the Court will deal with you summarily during recess time."

A further interrogation of Mrs. Jenison disclosed that she had acted as a juror in the May term of court in 1948 but had subsequently experienced a change in her religious beliefs which prevented her from again serving. In adjudicating the relator guilty and imposing sentence, the court stated:

> "Now, the Court has told you that the Court cannot excuse you. The law makes no provision for such an

> excuse, and the Court will ask you now once more whether you will now perform jury duty when called upon," to which she answered, "I cannot."

Thereupon the court, in the following language, adjudged Mrs. Jenison to be in contempt of court:

> "The Court finds and determines that Mrs. Owen Jenison is guilty of contempt of Court in refusing to serve as a juror and you may now step in front of the Clerk's desk and the Court will impose sentence.
>
> "It is considered and adjudged that as punishment for contempt of Court you be sentenced to the County Jail of Renville County for a period of thirty days.
>
> "It is further ordered that you may purge yourself of contempt at any time during said period if you will indicate to the Sheriff that you wish to be relieved and are willing to do your civic duty."

After remaining in custody for 7 days, Mrs. Jenison was released pending a review of her conviction by this Court.

There are three assignments of error: (1) That the conviction is in violation of Minn. Const. art. 1, § 16, and U. S. Const. Amend. I; (2) that relator was entitled to be excused under Minn. St. 628.49 governing women jurors; and (3) that the sentence was excessive.

1. Relator contends that the action of the trial court denied her rights which are secured by Minn. Const. art. 1, § 16, the applicable portions of which are as follows:

> "* * * The right of every man to worship God according to the dictates of his own conscience shall never be infringed, * * *; nor shall any control of or interference with the rights of conscience be permitted, * * *; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State, * * *."

In addition it is claimed that the court's action contravened the provisions of U. S. Const. Amend. I, prohibiting any "law respecting an establishment of religion, or prohibiting the free exercise thereof," which by the Fourteenth Amendment has been made applicable to the states.[1] We are of the opinion that the duty imposed on every citizen who is otherwise qualified to serve on a petit jury does not prohibit the free exercise of religion or interfere with the right to worship God according to conscience, and that refusal to serve is inconsistent with the peace and safety of the state.

The constitutional guaranty that every citizen may affiliate with whatever religious group teaches and practices doctrines which are consistent with his individual convictions, and that he may be governed by the dictates of his own conscience, is not an absolute, unfettered privilege. In striking down the contention that Federal laws prohibiting polygamy are in violation of the First Amendment, the United States Supreme Court has held that while Congress is deprived of legislative power over mere opinion, it is left free to reach actions which are in violation of social duties or are subversive of good order. Reynolds v. United States, 98 U. S. 145, 164, 25 L. Ed. 244, 249. The Supreme Court there held that to excuse prohibited practices because of religious belief would in effect permit every citizen to become a law unto himself. In a subsequent prosecution, also hinging on the practice of polygamy, the court stated (Davis v. Beason, 133 U. S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637, 640):

> "* * * It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society."

Under the First Amendment not even so serious a matter of personal conscience as bearing arms in time of war

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[1] Cantwell v. Connecticut, 310 U. S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213, 1218.

may be avoided because of religious principles. This question was determined adversely to a conscientious objector seeking naturalization in United States v. Macintosh, 283 U. S. 605, 623, 51 S. Ct. 570, 575, 75 L. Ed. 1302, 1310. There the United States Supreme Court held:

> "* * * The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him."[2]

Notwithstanding defendants' contention that securing medical assistance for a child was inconsistent with their religious beliefs, the Maryland Court of Appeals in passing on a conviction for manslaughter arising out of the parents' refusal to provide the child with necessary medical attention emphasized the distinction between the unqualified constitutional freedom to believe and the limited freedom to act. Craig v. State, 220 Md. 590, 599, 155 A. 2d 684, 690.

With these principles in mind, we turn to the question of whether refusal to act as a juror, based on a literal Biblical admonition, offends the peace, safety, good order, or morals of the community. Obviously the courts must have broad latitude in summoning qualified jurors if the constitutional right to a jury trial in civil and criminal cases is to be enjoyed by litigants in our judicial system.[3] The gravity

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[2] See, also, Tyrrell v. United States (9 Cir.), 200 F. 2d 8, 13.

[3] U. S. Const. Amend. VI: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury * * *."

U. S. Const. Amend. VII: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court in the United States than according to the rules of the common law."

Minn. Const. art. 1, § 4: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy, * * *."

Minn. Const. art. 1, § 6: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *."

of this responsibility has been well expressed by the Arizona court in County of Maricopa v. Corp, 44 Ariz. 506, 507, 39 P. 2d 351, 352:

> "Jury service is not a matter of choice, or right, but is a duty, imposed by the state. * * * It is analogous to military duty in time of war, in that the citizen designated by the state for jury duty must, like the soldier, serve whether he likes it or not, on such terms as the state may fix."

No concept in our Anglo-Saxon tradition is more firmly entrenched or more an integral part of our democratic heritage than the right of every citizen to be tried by a jury of his peers. To sanction the disqualification of a juror because of a conviction which is at variance with such a basic institution is to invite the erosion of every other obligation a citizen owes his community and his country.

Of the two cases cited by relator for reversal, one is readily distinguishable, and the other, while squarely in point, we do not choose to follow. In Watson v. Charlton, 243 Iowa 80, 50 N. W. 2d 605, the court reversed a conviction for contempt arising out of the attempt of a woman to avoid jury duty in a criminal case. She had been called initially on less than 4 hours' notice, and being the mother of small children who required her care, asked that she be excused from serving. In the face of the court's insistence that she remain, she adhered to her position that her domestic situation made it impossible, and was thereupon sentenced to 6 months in the women's reformatory. Notwithstanding the fact that within a few hours she relented and agreed to act, the court remained adamant and committed her to custody. The Iowa Supreme Court found a technical irregularity which warranted acquittal, but held that in any event it was clear she had effectively purged herself of contempt even if she were guilty. It is significant, however, that in so holding the court gave due recognition to the imperative need for responding to a jury summons in the following language (243 Iowa 93, 50 N. W. 2d 612):

> "* * * No higher responsibility rests upon the citizen than that of taking his place on the jury panel, when called, without evasion or complaint. * * *
>
> "Only the most compelling circumstances will direct the good citizen to ask an excuse when summoned to the jury panel; and the court should grant such a request, when made, only upon the best of grounds. Any other attitude on the part either of the juror or the court destroys the effectiveness of the jury system. * * * If at all possible, the good citizen will not only serve willingly when called, but will use his best efforts, intelligence and integrity in deciding the cases which are placed before him. Any lesser degree of understanding and performance makes a mockery of the long-established Anglo-Saxon jury system, * * *."

Although we are in complete accord with the decision in Watson v. Charlton, supra, we do not subscribe to the holding in United States v. Hillyard (E.D. Wash.) 52 F. Supp. 612. The court there found that a prospective juror, who refused to perform jury duty because of his religious convictions as a member of Jehovah's Witnesses, was relieved of that obligation under the terms of the First Amendment. The Federal court's opinion contains a scholarly analysis of the historical background which prompted the First Amendment, but the conclusions reached in applying the amendment do not persuade us.

It is not our function or prerogative to weigh and assess the merits of a particular religious doctrine. Nevertheless, we submit that the likelihood of this relator's conscience being unduly burdened by service on a jury is slight compared with the sense of guilt which might well afflict a conscientious objector who may be required to kill another human being in time of war without any constitutional right of exemption. We believe that if a citizen is to be relieved of jury duty for reasons of religion or conscience, his exemption should be extended by the legislature as in the case of the conscientious objector.

2. We find no merit in the contention of relator that she was entitled to exemption under § 628.49. That statute permits but does not require women jurors to be excused at their request. We hold that it was not an abuse of discretion to deny relator's request, and she was therefore not justified in defying the court's order directing her to continue on the panel.

3. The court's right to impose the sentence here for consideration is governed by Minn. St. c. 588. Section 588.01, subd. 2(1), defines a direct contempt as follows:

> "Direct contempts are those occurring in the immediate view and presence of the court, and arise from one or more of the following acts:
>
> "(1) Disorderly, contemptuous, or insolent behavior toward the judge while holding court, tending to interrupt the due course of a trial or other judicial proceedings."

Section 588.01, subd. 3, defines constructive contempts as "those not committed in the immediate presence of the court, and of which it has no personal knowledge," including, among other actions, a juror's neglect to attend or serve when summoned.[4]

If this was a constructive contempt, under these facts the maximum penalty authorized by § 588.02 was a fine of $50, whereas the punishment for a direct contempt under § 588.10 is not to exceed a fine of $250, or imprisonment up to 6 months, or both. We have in mind, however, that the court's disposition of the contempt permitted relator to purge herself of the offense at any time she elected to comply with the court's order.[5] We believe that relator was guilty of behavior which constituted a direct contempt justifying the sentence imposed. We are supported in this conclusion by Powell v. State, 48 Ala. 154, 156. There a

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[4] See, also, Minn. St. 628.48.

[5] See, § 588.12

juror, who had already been selected, left the box, claiming exemption as a fireman, and was therefore guilty of contempt under a statute governing "disrespectful, contemptuous, or insolent behavior in court, tending in any wise to diminish or impair the respect due to judicial tribunals, or to interrupt the due course of the trial." The two statutes are so similar as to suggest a common origin.

4. Whether we have the power to review and revise a sentence which does not exceed the statutory maximum has not been extensively considered by this court. In discussing the nature of direct contempts warranting summary punishment on the court's own motion without a formal trial, we have indicated that the court's power is arbitrary, born of necessity, and must be exercised with great prudence.[6] However, we have stressed the rule that an order adjudging a criminal contempt ought not to be reversed unless the court acted capriciously, oppressively, or arbitrarily.[7] We believe it is significant that the power to pass sentence, which the supreme court at one time enjoyed by statute, has now been withdrawn.[8] In State v. Barrett, 40 Minn. 65, 75, 41 N. W. 459, 463, a capital case in which a sentence of execution was imposed, we stated:

> "* * * The court refused to certify to the existence of exceptional circumstances in the case at bar, and this refusal is alleged as error. This is a matter which is peculiarly within the province of the court before whom the accused has been tried. No appellate court should interfere with its conclusions, unless there has been a palpable abuse of the discretion which should be exercised upon so momentous an occasion."

With few exceptions the laws of the various states make no provision for appellate review of sentences imposed by

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6 State ex rel. Russell v. Ives, 60 Minn. 478, 62 N. W. 831.

7 State v. Leftwich, 41 Minn. 42, 44, 42 N. W. 598, 599.

8 See, State v. Bilansky, 3 Minn. 246 at 261, Gil. 169 at 181; Rev. Stat. [Terr.] 1851, c. 129, § 222, replaced by Minn. St. 632.08; see, also, State v. Herrick, 12 Minn. 132, Gil. 75.

trial courts. Appeals to secure relief from harsh sentences have been uniformly unsuccessful, in the absence of express statutory sanctions. In requiring a reconsideration of a state trial court's sentence based on apparent misinformation, the United States Supreme Court stated (Townsend v. Burke, 334 U. S. 736, 741, 68 S. Ct. 1252, 1255, 92 L. Ed. 1690, 1693):

> "We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of *habeas corpus*."

Only where sentences result from convictions for contempt in Federal court has relief been granted after appellate review, the distinction in those cases stemming from the fact that the Federal statutes prescribe no limit on the punishment which may be imposed for contempt.[9]

In the light of our statutory history removing from the supreme court the right to revise criminal sentences on appeal, and following the great weight of authority, we hold that we may not review sentences in criminal matters where they do not exceed the limits imposed by statute.[10] Here relator had it within her power to effect her own release by expressing to the court her willingness to obey its order. The 30-day sentence merely placed a limitation on

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[9] Yates v. United States, 356 U. S. 363, 366, 78 S. Ct. 766, 768, 2 L. Ed. 2d 837, 840.

Recently the United States Supreme Court affirmed its position that it had no power to review discretionary sentences imposed by trial courts except in contempt matters. Gore v. United States, 357 U. S. 386, 393, 78 S. Ct. 1280, 1285, 2 L. Ed. 2d 1405, 1410.

See, also, Watkins, Appellate Review of the Sentencing Process in Michigan, 36 U. of Detroit L.J. 356; 369; 69 Yale L.J. 1453; 109 U. of Pa. L. Rev. 422; Annotations, 29 A. L. R. 318 and 89 A. L. R. 299.

[10] This is not to say that the validity of a given statute prescribing a particular punishment may not be challenged. State v. Dietz, Minn., 119 N. W. 2d 833.

the length of time she was to be held if she did not comply, although theoretically the court had the power under § 588.12 to continue her confinement indefinitely if she refused to capitulate. The judgment and sentence for contempt are affirmed.

Affirmed.

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IN THE

Supreme Court of the United States

October Term .....

In the Matter of Contempt Proceedings
in re MRS. OWEN JENISON

RESPONDENT'S OPPOSING BRIEF

WALTER F. MONDALE
Attorney General

CHARLES E. HOUSTON
Solicitor General
102 State Capitol
Saint Paul 1, Minnesota

35 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CA 2-2701

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IN THE

Supreme Court of the United States

October Term .....

In the Matter of Contempt Proceedings
in re MRS. OWEN JENISON

RESPONDENT'S OPPOSING BRIEF

It appears to the undersigned that it will be helpful to the Supreme Court of the United States in considering the petition for a writ of certiorari to be directed to the Supreme Court of Minnesota that the facts which the Supreme Court of Minnesota had for consideration shall appear herein. Accordingly we set out the Statement of Facts from the Respondent's Brief filed with the Supreme Court of Minnesota in Case 38940, beginning on page 3.

STATEMENT OF FACTS

At the time that this is written, there is no settled case. Rule III of this court appears to contemplate a settled case. It may be that the court considers such rule to apply only on a review of proceedings before the Industrial Commission. If a settled case is required, it must follow that the burden of obtaining one must rest upon the relator.

The return on the writ is made by Judge Rolloff of the District Court of Renville County. These facts appear therein (see paragraphs 2, 3 and 4 of return):

"The November 1962 General Term of Court in Renville County opened on November 12, 1962. Among the jurors duly drawn and summoned for the term was Mrs. Owen Jenison, a resident of Preston Lake Township, Renville County, Minnesota. The jurors were summoned to appear on November 13, 1962, at 9 o'clock, a.m. The jurors reported, and the Court spent 45 minutes giving the jurors an orientation talk. In the orientation talk the Court read M.S. 628.49 relating to excuses from jury duty and invited anyone who felt they had just ground for excuse to confer with the Court at recess in Chambers immediately following the orientation talk.

"At such recess Mrs. Jenison came into Chambers and asked to be excused on the ground of her religious belief. This was the only ground asserted by her for an excuse from jury service. The Court advised her that she could not be excused on that ground. She stated she would not serve, and the Court advised her then that she would have to serve and that if she failed to do so she would be held in contempt of Court and punished.

"The first jury case called for trial on that day was the case of Lamberton Implement Company, Inc. v. Delbert Meyer, Renville County File No. 17765. Mr. Ramon Esparolini of the firm of Cochrane, Thomson & Bresnahan of St. Paul appeared as attorney for the plaintiff, and Joseph W. Parris of Olivia appeared as attorney for the defendant. A panel of eighteen jurors was duly drawn for that case by Glen Agre, Clerk of Court. Among the 18 called was Mrs. Owen Jenison. The Clerk administered the oath to the 18 jurors so called for voir dire examination. Counsel for the respective parties conducted a voir dire examination of all of said jurors. None of the 18 were challenged for cause.

Counsel for the respective parties then exercised their peremptory challenges. No peremptory challenge was exercised by either party as to Mrs. Owen Jenison. Just as the Clerk was about to administer the oath to the 12 jurors chosen, Mrs. Owen Jenison stood up in the jury box and made the statements which show in the transcript hereto attached."

The reporter's transcript of the proceedings is attached to the return as a part thereof. Therein appears the following:

"(At 9:45 a.m., Tuesday, November 13, 1962, following the orientation talk to the jury by the Court at the beginning of jury work for the November 1962 General Term of Court in Renville County, the case of Lamberton Implement Co., Inc. v. Delbert Meyer was called for trial, a panel of 18 drawn, voir dire examination conducted by counsel, there being no challenges for cause and peremptory challenges having been exercised, the Clerk was about to administer the oath to the jury as selected, and the following proceedings were had, Mrs. Owen Jenison being one of the 12 jurors chosen to serve on the case.)

"Mrs. Jenison: (Standing) Sir, I cannot serve on this jury. I cannot judge.

"The Court: The Court has told you that you must serve, and you will remain where you are and serve as a juror in this case.

"Mrs. Jenison: Well, I'll pronounce no judgment. I can't. It's against by Bible teaching. My Bible tells me, 'Judge not, so you will not be judged.'

"The Court: In view of your statements the Court holds you in contempt of Court. You will stay in the courtroom and the Court will deal with you summarily during recess time.

"You may step down and take a seat in the courtroom.

"Let the record show that because of this witness' refusal to serve on the jury the Court hereby finds that she is in contempt of Court. You may step down.

"(Thereupon Mrs. Jenison stepped down and proceedings were had to select one more juror to serve in the case.)

"(At 11:45 a.m., Mrs. Jenison and the Sheriff being present, proceedings were had as follows:)

"The Court: Mrs. Jenison, will you come forward in front of the Clerk's desk and be sworn. The Clerk will swear you.

"MRS. OWEN JENISON,

having first affirmed before the Clerk of the Court that she would make true answers to questions put to her, was examined and testified as follows:

"EXAMINATION

"By the Court:

"Q. Mrs. Jenison, so that the record may be clear, the Court understands that you refuse to serve as a juror because of some religious affiliation that you have. Is that correct?

"A. That is right.

"Q. And what church is it that you are connected with?

"A. Well, I'm a believer of the Bible, but we listen to the Radio Church of God.

"Q. Now, in 1948, in the May Term of Court you served as a juror in this court, in this county, did you not?

"A. I don't remember what year it was, but I have served. It's about 14 years ago; something like that.

"Q. And I was the presiding judge at that time, is that correct?

"A. I don't remember.

"Q. And at that time you made no protest about serving as a juror?

"A. That is right.

"Q. Have you since that time changed your religious belief?

"A. That is right.

"Q. According to the records you served in a case, or two cases which were consolidated, and you were paid for four days of jury service in May of 1948.

"A. Well, I was paid, but I don't know how many days.

"Q. Now, the Court has told you that the Court cannot excuse you. The law makes no provision for such an excuse, and the Court will ask you now once more whether you will now perform jury duty when called upon?

"A. I cannot.

"The Court: The Court finds and determines that Mrs. Owen Jenison is guilty of contempt of Court in refusing to serve as a juror and you may now step in front of the Clerk's desk and the Court will impose sentence.

"IT IS CONSIDERED AND ADJUDGED that as punishment for contempt of Court you be sentenced to the County Jail of Renville County for a period of thirty days.

"IT IS FURTHER ORDERED that you may purge yourself of contempt at any time during said period if you will indicate to the Sheriff that you wish to be relieved and are willing to do your civic duty. You are willing to accept all the benefits of citizenship and you refuse to perform even one single, tiny bit of citizenship responsibility so that you may enjoy the benefits of citizenship. Such conduct cannot be condoned.

"You are ordered placed in the custody of the Sheriff. That is all."

ARGUMENT

In 17 C.J.S., Contempt, p. 33, Sec. 25, we read:

> "Any act or conduct which shows disrespect for the dignity or authority of the court, or which obstructs or tends to obstruct, interrupt, prevent, or embarass the administration of justice, constitutes contempt of a criminal nature; and, when such act or conduct is committed in the presence of the court, or so near thereto as to interrupt its proceedings, it is a direct contempt, provided, also, it occurs while the court or the judge is engaged in the discharge of a judicial duty. * * *"

The judge is the master of the court. When the judge states the law, it is the law of the case which a juror may not question. In this case, the juror questioned the law and stated that she would not serve as a juror even though the judge advised her that she must serve and upon her failure to do so she would be held in contempt of court and punished. She had previously served as a juror at a former term of court. She was admonished by the court that she could not be excused on the ground of her religious belief and that was the only ground which she claimed as an excuse from jury service.

M.S.A. 628.49 had been read by the court to the jury panel. That section of the statutes expressly states that the court shall *not excuse* from service any person except upon the grounds therein stated. The excuse claimed by the relator is not among the grounds of exemption so stated. The court had the power in its discretion to excuse the juror, but she did not have the right to demand it. Clearly, it was no abuse of discretion for the court to refuse to exempt her from jury service.

Although relator was firm in her determination that she should "judge not", she was quick in asking that the court should adjudge that she was unjustly convicted for contempt. Such philosophy is unsound. Relator's obligations of citizenship are not subject to her will or whim.

50 C.J.S., Juries, p. 867, Sec. 143, declares that any person otherwise competent may serve as a juror no matter what his religious belief may be. And, if he is competent for the duty, the choice whether he shall serve is not his. It is for the court to decide.

Art. I, Secs. 6, 7, of the Minn. Const., cited in the petition for a writ of certiorari, are inapplicable to the facts under consideration.

Conley v. U.S., 59 F. 2d 929, held that the power to punish for contempt is inherent in all courts. It further held that judgment of contempt should not be disturbed except in case of clear miscarriage of justice. And it held that failure to appoint counsel for the accused was not error. The court said that these proceedings are "neither civil actions nor criminal prosecutions, as ordinarily understood", citing *Myers v. U. S.*, 264 U.S. 95, 44 S. Ct. 272, 68 L. ed. 577. The power may be likened to the inherent power of the court to discipline attorneys of the court.

THE QUESTIONS

The questions which the petitioner present are whether her conviction for contempt of court for refusing to serve on a jury violated her rights (1) under the First Amendment to the Constitution of the United States, and (2) whether petitioner's conviction of contempt without advising her of her right to counsel and without affording her adequate time to

prepare a defense, violated her rights under the Fourteenth Amendment. The Minnesota Supreme Court was of the opinion "that the duty imposed upon every citizen who is otherwise qualified to serve on a petit jury does not prohibit the free exercise of religion or interfere with her right to worship God according to conscience, and that refusal to serve is inconsistent with the peace and safety of the state." The court further states that "The Constitutional guaranty that every citizen may affiliate with whatever religious group teaches and practices doctrines which are consistent with his individual convictions, and that he may be governed by the dictates of his own conscience, is not an absolute unfettered privilege."

The cases which the Minnesota Supreme Court cite in support of its opinion well illustrate the underlying philosophy of the opinion and conclusion reached. Thus *Maricopa v. Corp*, 44 Ariz. 506, 507, 39 P. 2d 351, 352, compares the duty to serve as a juror to military duty in time of war. It is not for the citizen to say that he will not serve his country as a juror or as a soldier. The law decides and has decided.

The Minnesota Supreme Court cites *U. S. v. Hilliard*, 52 F. Supp. 612, which is a decision by the United States District Court for the Eastern District of Washington. In that case it was held that refusal of a Jehovah Witness to serve as a juror because of religious belief is justified by constitutional amendment prohibiting Congress from making any law prohibiting the free exercise of religion. To such last stated proposition the Minnesota Supreme Court did not subscribe.

We are impressed by the force of Judge Swellenbach's language in his opinion stating:

> "I must confess an utter inability to comprehend any relationship between defendant's professed religious beliefs and his distaste for jury service. I am unable to rec-

> oncile the Jehovah's Witnesses' abhorrence for human institutions with the alacrity with which they rush into the protecting arms of our courts whenever they become involved on controversy with our civil or military authorities. * * *"

We fail, as did also the Minnesota Supreme Court, to follow the logic of the author of that opinion in reaching his conclusion.

Braunfeld v. Brown, 366 U. S. 599, cited in petitioner's brief at page 6, states at page 601:

> "* * * Thus, the only question for consideration is whether the statute interfers with the free exercise of appellants' religion."

Appellants were members of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They were in the clothing business and brought this suit to enjoin the enforcement of the Pennsylvania criminal statute which forbade the retail sale on Sunday of those commodities.

Chief Justice Warren at page 603 cites *Reynolds v. U. S.*, 98 U. S. 145, at p. 164, where he states that legislative power over mere opinion is forbidden but it may reach people's *actions* when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion.

The Chief Justice at page 605 cites Reynolds v. U. S., supra, which upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. He further cited Prince v. Massachusetts,

321 U. S. 168, where the Supreme Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work.

On page 606 the Chief Justice said:

> "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. * * *"

On page 607 the Chief Justice states that if the state regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance unless the state may accomplish its purpose by means which do not impose such a burden. But the opinion of the Chief Justice sustained the validity of the Pennsylvania statute.

In *McGowan et al. v. Maryland*, 366 U. S. 420, at page 461, Mr. Justice Frankfurter said:

> "* * * However, this freedom does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation."

The Minnesota Court reached a sensible and logical conclusion that if the prospective juror is to be excused from service, such excuse must rest upon a rule of statute.

The statute, 628.43, specifies the grounds for exemption from jury duty. See petitioner's brief and petition, p. 3. It is exclusive.

We cannot and should not attempt to deprive a court of its discretion. To deprive a court of discretion is to make the judge a mere administrator.

Petitioner cites no authority to the effect that she was entitled to counsel upon consideration by the trial court whether a direct contempt was committed in the presence of the court and what the result thereof should be.

From her summary conviction of contempt she appealed to the Supreme Court of Minnesota, which court sustained the conviction in the trial court. It was held by the Supreme Court of Minnesota that the conviction should be sustained. So she has enjoyed due process of law.

Petitioner argues as though this were a criminal proceeding. It is not. It is a direct contempt committed in the conduct of a civil case. Procedure in a direct contempt and in a constructive contempt are different. That the present case was one for summary disposition requires no argument.

The entire proceeding may be summed up thus: Petitioner claims the benefits of citizenship free from its obligations. To such a claim the Minnesota Supreme Court did not subscribe.

That the pending petition for a Writ of Certiorari directed to the Supreme Court of Minnesota should not issue is

Respectfully submitted,

WALTER F. MONDALE
Attorney General

CHARLES E. HOUSTON
Solicitor General
102 State Capitol
Saint Paul 1, Minnesota

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